

A Random Thought on the Segregation Cases

One-hundred fifty years ago this Court held that it was the ultimate judge of the restrictions which the Constitution imposed on the various branches of the national and state government. Marbury v. Madison. This was presumably on the basis that there are standards to be applied other than the personal predilections of the Justices.

As applied to questions of inter-state or state-federal relations, as well as to inter-departmental disputes within the federal government, this doctrine of judicial review has worked well. Where theoretically co-ordinate bodies of government are disputing, the Court is well suited to its role as arbiter. This is because these problems involve much less emotionally charged subject matter than do those discussed below. In effect, they determine the skeletal relations of the governments to each other without influencing the substantive business of those governments.

As applied to relations between the individual and the state, the system has worked much less well. The Constitution, of course, deals with individual rights, particularly in the first Ten and the fourteenth Amendments. But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. Fletcher v. Peck, in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. Scott v. Sanford was the result of Taney's effort to protect slaveholders from legislative interference.

After the Civil War, business interest came to dominate the court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. Championed first by Field, then by Peckham and Brewer, the high water mark of the trend in protecting the majority opinion in that case, Holmes replied that the fourteenth Amendment did not enact Herbert spence's Social Statios. Other cases coming later in a similar vein were Adkins v. Children's Hospital, Hammer v. Dagenhart, Tyson v. Banton, Ribnik v. McBride. But eventually the Court called a halt to this reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own

citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

In these cases now before the Court, the Court is, as Davis suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction. If this Court, because its members individually are "liberal" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction. To the argument made by Thurgood Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind -- whether those of business, slaveholders, or Jehovah's Witnesses--have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think Plessy v. Ferguson was right and should be re-affirmed. If the fourteenth Amendment did not enact Spencer's Social Statios, it just as surely did not enact Myrddahl's American Dilemma.

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